

REMARKS

Claims 1-26, 30, 31 and 34-60 are pending in the application, with claims 30, 31 and 34-42 in active prosecution. Claims 1-26 and 43-60 are withdrawn from consideration due to a restriction requirement. Claims 27-29, 32, 33 and 61-67 have been previously cancelled. New claims 68-72 are presented, with claims 68 and 71 being independent.

After the amendments above, the pending claims are 2, 3, 5-10, 24, 36-42, and 68-72. As explained below, it is believed that new claim 68 provides a linking claim that allows rejoinder and allowance of all of the pending claims that are presently withdrawn from consideration.

Restriction/election

As this is the first substantive response filed by this attorney, it is believed to be useful to review the status of the elections that were made by the previous attorney, to assure that attention is properly focused on claims that read on the elected invention.

In an action mailed 13 June 2006, the Examiner required a restriction to one of three patentably distinct inventions. Of these, applicant elected invention I, directed to a spinal rod system. At that time, the elected claims were 1-22, 27-42 and 61-67.

The Examiner also made an election of species requirement, the three species being Figs 1-6 (species A), Fig 7 (species B) and Figs 8, 9 and 11-13 (species C). Fig 10 was properly not included, as it depicts the prior art. Of these, the applicant elected species C. The claims that read on the elected species are the same as those which read on invention I, that is, claims 1-22, 27-42 and 61-67.

Subsequently, the Examiner withdrew claims 1-26 and 43-60 from consideration, as being directed to a non-elected species, and claims 27-29, 32, 33 and 61-67 were cancelled by the applicant.

Of the new claims presented, applicant respectfully asserts that claims 68 and 71 are generic. Device claim 69 reads onto species C. Device claim 70 reads onto species A. New method claim reads onto species C.

Drawings

A drawing requirement appears to be fully complied with, as it is not repeated.

Claim amendments

In an attempt to advance the claims to allowance, the applicant presents new claims 68 through 72. Of these, new claim 68 is an independent claim that links species A-C, with new dependent claim 69 reading on species B and C and new dependent claim 70 reading on species A. Accordingly, applicant respectfully suggests that, if claim 68 is allowable, then claim 70 should be allowable. If claim 68 is not allowable, then claims 68 and 69 should be examined, but claim 70 (and all claims depending from it) are properly withdrawn from consideration.

The applicant has reviewed the claims and, in view of the elections made previously, the applicant now cancels claims 4, 11-22, and 49-60.

The applicant has also amended claims 2, 3 and 5-10 to properly depend from claim 70. If claim 70 is determined to be allowable, each of these withdrawn claims should be allowed.

The Examiner has, correctly although belatedly, raised a rejection of claims 30-31 under 35 USC 101 as being drawn to non-statutory subject matter, since they positively recite part of a human body within their scope. This is mooted by cancellation of these claims. New independent claim 68 has been drafted in a manner to avoid the subject matter rejection.

Claim 35 is cancelled as duplicating limitations already found in claim 69. Claims 36-42 are amended to be properly dependent through claim 69, so all of these claims are still within the elected species.

Independent method claims 22, 24, 43 and 46 are cancelled, with a new independent method claim 71 being presented. New claim 71 claims the use of a particular embodiment of the rod retention system, namely, claim 68, so it should be allowable and not subject to restriction.

Dependent method claim 23 is amended to depend from claim 71, and dependent claim 26, which presents the same limitation, is cancelled. Dependent method claims 44, 45, 47 and 48 are also cancelled. New dependent claim 72 incorporates limitations of cancelled claim 46.

No new matter is presented in any of the new claims.

Rejections under 35 USC 102(b)

Claims 27, 30-34, 37-42, 61 and 64 were previously rejected as anticipated by US Patent 6,090,111 to Nichols ("Nichols '111"). While moot as to cancelled claims 27, 32, 61 and 64, this rejection is believed to have been overcome in claims 30, 31 and 37-42, as the rejection is not repeated.

Claims 27-29 and 61 were previously rejected as anticipated by US Patent 6,755,829 to Bono ("Bono '829"). This rejection has been mooted by cancellation of all of these claims and is not repeated.

There are no current rejections under 35 USC 102(b). Further, new independent claim 68 clearly distinguishes both Nichols '111 and Bono '829.

Rejections under 35 USC 103(a)

Claims 30-34 and 37-42 were previously rejected as obvious over a combination of Bono '829 with US Patent 6,280,442 to Barker. This rejection is apparently overcome, as it is not repeated.

Claims 30-31 and 34-42 are now rejected as obvious over a combination of US Patent 5,879,350 to Sherman ("Sherman '350") with Bono '829.

It is the Examiner's position that Sherman '350 discloses the claimed invention except for the claimed closure mechanism, which is found in Bono '829. Applicant respectfully traverses. The Sherman '350 invention specifically states at Col. 5, lines 50-56, that the central bore 34 of the rod retention assembly has a diameter that is larger than the diameter of the head of the bone screw. Sherman clearly teaches a system where a collet 13, intermediate between the rod R and the bone screw head 22, is pressed downward into the tapered recess at the bottom of the receiver member 12, so that gripping fingers 50 on the collet are "resiliently pressed against" the bone screw head. Col. 7, line 58. Sherman '350 has a stated purpose of minimizing the profile of the components used to secure an orthopedic rod. Col. 2, lines 60-63. It is the applicant's position that, while this is an admirable purpose, the higher purpose in a spinal fixation device is that the bone screw be permanently secured to the rod receiver. That purpose is not achieved when the bone screw head can be popped upwardly into the receiver cup through the bottom opening, which is possible with Sherman '350.

Such an action is not physically possible with the claimed invention. The fastener assembly, whether it comprises a bone screw alone (with a larger head) or a bone screw head and a seat ring interposed between the bone screw head and the retention assembly bottom opening, cannot be inserted into the retention assembly through the bottom opening.

Further correspondence should be with the undersigned newly-appointed attorney.

Respectfully submitted,

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